NO. 07-474

IN THE
SUPREME COURT OF THE UNITED STATES

ANUP ENGQUIST,
Petitioner
v.
OREGON DEPARTMENT OF AGRICULTURE, ET AL.
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The National School Boards Association (NSBA) is a not-for-profit federation of state associations of school boards across the United States. The NSBA federation represents the nation's 95,000 school board members, who, in turn, govern approximately 15,000 local school districts. These school districts employ over 6 million teachers[2] and another approximately 6 million non-certificated staff, including paraprofessionals, custodians and other building maintenance personnel, school psychologists and social workers, bus drivers, and food service workers. Taken as a whole, public school districts are the nation's single largest government employer.[3] NSBA is dedicated to the improvement of public education in America and has long been involved in advocating for a reasonable balance between the obligation of public schools to promote the efficiency of the public

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[1] This brief is filed with the consent of both parties. Letters of consent are on file with the Clerk of this Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amicus curiae* and its members and counsel made any monetary contribution to the preparation or submission of this brief.

[2] U.S. Census Bureau, Census 2000 Special Employment Opportunity Tabulation, *available at*, http://www.census.gov/hhes/www/eeoindex/page_c.html?

[3] In comparison, as of January 1, 2003 1.4 million people were on active duty in the U.S. military with an additional 1.3 million people in the National Guard and Reserves. U.S. Census Bureau, Facts for Features – U.S. Armed Forces and Veterans, *available at*, http://www.census.gov/Press-Release/www.2003/cb03-ff04se.html.

education system, and the private interests of employees affected by governmental action.

NSBA submits this brief to emphasize the significant adverse impact that overturning the Ninth Circuit's decision in *Engquist v. Oregon Department of Agriculture* would have on the operation of our nation's schools.

SUMMARY OF THE CASE

Anup Engquist was an employee of the Oregon Department of Agriculture (ODA) who, during the course of her employment, experienced repeated difficulties with Joseph Hyatt, another ODA employee. Hyatt was disciplined for his behavior by then-Director of ODA Laboratory Services, Norma Corristan. Hyatt eventually drafted a plan for the Assistant Director of the entire ODA, John Szczepanski, to reorganize the Export Service Center (ESC), a laboratory of the ODA in which Engquist worked. Assistant Director Szczepanski had made it known that he could not "control" Engquist, and Hyatt told a co-worker that he and the Assistant Director were working to "get rid of" Engquist.

Ultimately, Hyatt was promoted by Szczepanski, over Engquist who also applied for the position, to manage the ESC. Shortly thereafter, the Governor of Oregon called for budget reductions in state departments, and the Director of ODA Laboratory Services (Corristan) position was eliminated by Szczepanski. A few months thereafter, Engquist was informed by Hyatt that her position also was being eliminated, due to

reorganization. She was offered, pursuant to her collective bargaining agreement, the opportunity to "bump" into another position, but there was no position open at her level for which she was qualified, and thus she was laid off. Engquist sued the Oregon Department of Agriculture, claiming, in pertinent part, that as a "class of one" her equal protection rights had been violated. This claim proceeded to a jury trial, and the jury concluded that Defendants were liable for violations of equal protection and substantive due process. The United States Court of Appeals for the Ninth Circuit reversed, holding that the class-of-one theory was not applicable to decisions made by public employees.

SUMMARY OF THE ARGUMENT

The Ninth Circuit and the United States Court of Appeals for the Seventh Circuit are the only two circuits to analyze the "class of one" theory in the context of state and local public employment in any depth. Both Circuits have concluded that, unless constrained, the "class of one" remedial theory of equal protection could provide a federal cause of action for review of almost every state or local governmental personnel decision. This is in keeping with this Court's longstanding warning that the federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. *See Bishop v. Wood*, 426 U.S. 341, 349-50 (1976). In the context of our nation's 15,000 school districts, which employ approximately 12 million people nationwide, this Court should not create a new

their internal affairs. NSBA urges this Court to affirm the decision of the Ninth Circuit.

ARGUMENT

I. The policy decision before this Court is whether federal courts will become super personnel departments, responsible for addressing every grievance made by school district employees across the country.

This Court has recognized that the federal courts should not become super personnel departments through the creation of a new remedial equal protection theory when extensive remedies already exist and the government appropriately has wide latitude in making personnel decisions when acting as an employer. "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error." *Bishop v. Wood*, 426 U.S. 341, 349-350 (1976). Just as this Court found, in *Bishop*, that the Due Process clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions, so too should it find that the "class of one" remedy is not an appropriate application of Equal Protection in the school district employment context. The Court, in *Bishop*, further considered the fact that by implication, to do otherwise leads to

judgment would not be warranted and the case would proceed to trial.

It is easy to imagine the limitless avenues for federal claims based on the literally millions of

basketball. *Vukadinovich*, 853 F.2d at 1388. He resigned as a basketball coach, and in a local newspaper article was quoted with comments to the effect that he had been asked to step down as coach and didn't think it was fair. *Id*. Soon after the article, he received notice that his teaching contract was to be cancelled due to his lack of a proper certificate. *Id*. at 1389. Vukadinovich sued, claiming in part that he was treated differently than other uncertified teachers in retaliation for the exercise of his First Amendment rights. *Id*. In other words, he did not dispute that he could have been fired simply because he was uncertified; but instead claimed that he was selected for termination, while other uncertified teachers were not, because he exercised his right to free speech. *Id*. The Seventh Circuit noted that:

> Although in a sense any events which transpire in a public school are matters of public concern, we have recently quoted *Connick* as stating, "'To presume that all matters which transpire within a government office are of public concern would

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for him, allowing him to teach industrial arts until he could complete the courses required for certification, on the basis that they certified "an emergency need for personnel in the teaching area," as required by Indiana regulation. However, Vukadinovich never did what was needed to obtain a permanent certification to teach industrial arts.

> mean that virtually every remark ... would plant the seed of a constitutional case.'"

Id. at 1390, (*citing Hesse v. Board of Educ.,* 848 F.2d 748, 752 (7th Cir. 1988) (*quoting Connick*, 461 U.S. at 149)). The Seventh Circuit found Vukadinovich's speech unprotected, and thus, found that his § 1983 claim failed. 853 F.2d at 1391. The Seventh Circuit reached its decision in 1988, but the outset of Vukadinovich's litigation commenced in 1981. *Id*. at 1389.

When teachers are permitted to transform what are essentially personal disputes with employers into constitutional claims, not only is the waste of time and money on litigation tremendous, but student achievement and welfare may be compromised. School districts must be able to swiftly and effectively discipline or terminate employees who put student education or safety at risk by failing to execute their responsibilities in the manner prescribed by the school board and state lawmakers. They must be able to do so without undue fear of Fourteenth Amendment claims based solely upon the "dissimilar" treatment a single employee may allege when his or her peers "similarly situated" by the very fact that they are also employees of the school district are not disciplined in what the employee perceives to be the same manner for alleged similar employee misconduct.

Courts have long recognized the authority of schools to control the policies, rules, and regulations governing employment of teachers and staff. Given

the vulnerability of young students in the care of schools for multiple hours every day and the heightened accountability standards for student performance that have been imposed in the last five years,[5] it is especially critical that school boards retain control over the employee disciplinary process. All public school districts in the country are answerable to taxpayers and to the federal government, who are increasingly holding them responsible for the academic performance of their students in myriad ways. Every state has passed some form of performance-based accountability—setting the standards for content to be taught in the classroom, conducting state-wide testing, setting targets for student learning, and critically, putting sanctions in place if student outcomes are not meeting expectations. Performance-based accountability is also the centerpiece of No Child Left Behind, which connects millions of dollars in public school federal funding to student outcomes, and severely sanctions schools and districts who fail to meet the federally-required improvement on tests. This entire new era of accountability is based upon the premise that school districts and their administrators are capable of not only monitoring student performance, but of making decisive managerial decisions about resources, responsibilities and structures that are connected to performance. Nothing could be closer to student performance than teacher performance. Implementing changes in teacher responsibilities and promptly correcting and/or sanctioning teachers

[5] *See* No Child Left Behind Act, 20 U.S.C. § 6301 *et seq*. (2008).

who are unwilling or unable to meet the heightened expectations of today's classroom is imperative.

Courts have long recognized the authority of schools to control their policies, rules, and regulations governing employment of teachers and staff. *See, e.g., Milliken v. Bradley*, 418 U.S. 717 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools.") The educational mission is of such crucial importance that Justice Frankfurter noted that one of the four "essential freedoms" of a public educational institution was "to determine for itself on academic grounds *who* may teach...." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (emphasis added).

This Court's precedents simply do not support the existence of a constitutional cause of action behind every action a public employee makes in the course of doing his or her job. The Fourteenth Amendment ought not be used to effectively make every instance of managerial discipline into a federal equal protection case. When any unexplained or unjustified disparity of treatment by a school employee or school board is deemed a prima facie denial of equal protection, limitless claims of federal liability are possible. Regardless of whether or not such cases can be regularly won is beside the point. Engquist's proposed contrary rule in the instant case would commit state and federal courts to a new, permanent and intrusive role, mandating additional and unnecessary judicial oversight of the daily decisions of over 95,000 school board members.

II. This Court has refused to create a new judicial equal protection remedy in the realm of federal public employment law.

A. This Court pays heed to "special factors counseling hesitation" before creating a new judicial remedy.

Creating a "class of one" equal protection claim for every disgruntled public school employee aggrieved by an employment action would unnecessarily add a new judicial remedy to the multitude of already-existing remedies held by the 12 million largely-unionized public school employees in the United States. These remedies were carefully constructed by lawmakers, as well as by public employers and unions through contractual negotiations, to achieve a balance between worker rights and an efficient education system. In creating a new judicial remedy, the Court must be cognizant of these already-existing remedies. *See Bush v. Lucas*, 462 U.S. 367 (1983). In *Bush v. Lucas*, the Court held that it would not create a new judicial remedy for federal public employees as it would be "inappropriate for us to supplement that regulatory scheme with a new judicial remedy." *Id.* at 368.

Of particular importance here, the Court acknowledged that it must pay "particular heed . . . to any special factors counseling hesitation before

such a new remedy should be provided." *Id*. at 380. The Court made clear that

> [t]he question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue. That question obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff. The policy judgment should be informed by a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy for

> violations of employees' [constitutional rights].

Id. at 388.

B. The "special factors counseling hesitation" here include more than the numerous measures examined in *Bush* but also the measures adopted by federal, state, and local governments to protect the rights of employees of school districts.

Federal, state, and local governments have adopted various measures to protect employees from employers who would commit unlawful or otherwise inappropriate actions. These include federal and state whistle-blower protection laws; labor codes; and for virtually every teacher in the United States, statutory protections which provide specific due process rights concerning notice and opportunity to be heard before the school board that is recommending discipline, non-renewal or termination of the teacher's contract.[6] Finally, two-thirds of all states have collective bargaining statutes covering teachers and mandating that local school districts bargain over the terms and

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[6] *See* Education Commission of the States, Teacher Tenure/Continuing Contract Laws: Update for 2007 (2007), *available at* http://www.ecs.org/clearinghouse/75/64/7564.doc, which delineates statutes in every state in the United States that provide certain job protections and due process considerations for teachers.

to appeal the school board's decisions to some

1981 and 1983. Finally, this Court would create quite a paradox by announcing a new federal constitutional remedy to school teachers that Congress itself has specifically chosen to avoid. *See Lauth*, 424 F.3d at 633 (noting that it would not "inject the federal courts into an area of labor relations that Congress disclaimed a federal interest in.").[10]

This Court should not tamper with these extensive and carefully constructed measures. These special factors counsel against the creation of the new judicial remedy of "class of one" for public employees. Given Congress' reluctance and the panoply of federal, state, and local laws and regulations protecting employees of school districts, there is, quite simply, "no gap in legal protections to justify dragging in equal protection concepts designed for entirely different situations." *Id*. at 633. As Judge Posner cogently explained, "when as in this case the unequal treatment arises out of the employment relation, the case for federal judicial intervention in the name of equal protection is especially thin." *Id*.

Given all the protections discussed above, the case for a new judicial remedy here is not just thin, it evaporates. Petitioner herself brought claims under Title VII, 42 U.S.C. § 1981, equal protection, procedural and substantive due process, and intentional interference with contract. *Engquist*, 478 F.2d at 991. However, she did not avail herself of a claim under 42 U.S.C. § 1983 or of remedies

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[10] The National Labor Relations Act does not apply to state or municipal employees. 29 U.S.C. §152(2) (2008). *Abood v. Detroit Board of Education*, 431 U.S. 209, 233 (1977).

through her collective bargaining agreement. *Id.* at 995 n.5. As such, there is no gap in legal protections to warrant the creation of a new judicial remedy to supplement the already-existing remedies created by federal, state, and local governments, as well as clearly established constitutional rights.

subject." *International Soc. for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992). In other words, the restrictions that the Constitution places upon the government in its capacity as employer are not the same as the restrictions that it places upon the government as sovereign. *See Rutan v. Republican Party of Illinois*, 497 U.S. 62, 94 (1990) (Scalia, J., dissenting). The Court has "recognized this in many contexts, with respect to many different constitutional guarantees." *Rutan*, 497 U.S. at 94 (Scalia, J., dissenting).[11]

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[11] Notably, this Court has also recognized that constitutional protections need not be as strong outside the government as employer context. For example, in *National Endowment for the Arts v. Finley*, 524 U.S. 569, 589 (1998), the Court considered whether a provision of the National Foundation on the Arts and the Humanities Act violated the First and Fifth Amendments. The statute, 20 U.S.C. § 954(d)(1) (2008), required the Chairperson of the National Endowment for the Arts to ensure that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." *Finley*, 524 U.S. at 572. The Court determined that the Act was not unconstitutionally vague even though "the terms of the provision are undeniably opaque, and if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns." 524 U.S. at 588. The Court observed, "We recognize, as a practical matter, that artists may conform their speech to what they believe to be the decisionmaking criteria in order to acquire funding. . . . But when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe." *Id*. at 589. The court noted that "[i]n the context of selective subsidies, it is not always feasible for Congress to legislate with clarity. Indeed, if this statute is unconstitutionally vague, then so too are all Government

Moreover, the Court has cautioned against "constitionaliz[ing] the employee grievance." *See Connick v. Meyers*, 461 U.S. 138, 154 (1983). In *Pickering v. Board of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563, 568 (1968), the Court adopted a balancing test between the interests of a public employee (there, a teacher), as a citizen, in commenting upon matters of public concern and the interests of the State (there, a school district), as an employer, in promoting the efficiency of the public services it performs through its employees. The Court noted that it was indisputable that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.* at 568.

B. This Court has repeatedly limited the scope of constitutional protections afforded to public employees in light of the government's need to carry out its mission effectively and efficiently.

"Public employers have an interest in ensuring that their agencies operate in an effective and efficient manner." *O'Connor v. Ortega*, 480 U.S. 709, 724 (1987) (plurality

ensuring that the work of the agency is conducted in a proper and efficient manner." *Id*.

In light of the government's need to carry out its mission effectively and efficiently, this Court has repeatedly limited the scope of constitutional protections afforded to public employees. For example, in *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, *supra*, the Court limited due process protections because of the government's need to maintain security in military operations. 367 U.S. at 896. Noting the government's interest in the "dispatch of its own internal affairs," the Court asserted that the "Fifth Amendment does not require a trial-type hearing in every conceivable case" and that "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Id*. at 894-95 (quotations omitted). The Court observed:

> [T]he governmental function operating here was not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but, rather, as proprietor, to manage the internal operation of an important federal military establishment.

Id. at 896.

This Court likewise limited the scope of due process protections afforded public employees in *Kelley v. Johnson*

461 U.S. at 147. The Court noted that "government offices could not function if every employment decision became a constitutional matter." *Id.* at 143. The Court warned that "[t]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark . . . would plant the seed of a constitutional case." *Id.* at 149.

Similarly, in *Waters v. Churchill, supra,* the Court observed that "not every procedure that may safeguard protected speech is constitutionally mandated." 511 U.S. at 670. There, the Court examined "[w]hat it is about the government's role as employer that gives it a freer hand in regulating the speech of its employees rather than it has in regulating the speech of the public at large." *Id.* at 671. The Court opined that "the extra power the government has in this area comes from the nature of the government's mission as employer.

> public at large just in the name of efficiency. But where the government is employing someone for the very purpose of achieving its goals, such restrictions may well be appropriate.

Id. at 675. The Court maintained that "where the government is acting as employer, its efficiency concerns should . . . be assigned a greater value." *Id.*

Likewise, in *Garcetti v. Ceballos*, *supra*, this Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." 547 U.S. at 421. The Court reasoned in part that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen" and instead "simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* at 421-22.

C. This Court has recognized that wide latitude is necessary for public employers, and this is particularly true for public school districts, given the special characteristics of the school environment.

In *Arnett v. Kennedy, supra*, this Court noted that "[p]rolonged retention o
otherwise unsatisfactory employee can adve
affect discipline and morale in the work place, f
an office or agency." 416 U.S. at 168. As such
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15,000 school distr
Public schools have
New Jersey v. T.L.

2629. As such, when a student "suddenly and unexpectedly unfurled [a] banner" which read "Bong Hits 4 Jesus," and the principal "had to decide to act—or not act—on the spot," the Court maintained the principal acted reasonably in concluding that the banner promoted illegal drug use and disciplining the student accordingly. *Id.*

The "special characteristics of the school environment" which attend the rights of students also affect school districts as public employers. When a citizen is working as a public employee, the constitutional rights that employee enjoys are circumscribed by the very nature of that employment. "When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Garcetti*, 547 U.S. at 418. This Court's policy has been "'the common-sense realization that government offices could not function if every employment decision became a constitutional matter.'" *O'Connor*, 480 U.S. at 722, *citing Connick*, 461 U.S. at 143. Just as this Court has found that certain school employee speech is not protected by the First Amendment, so too should this court find that certain school employee behavior is not protected by the Fourteenth Amendment under a "class of one" remedy. "Without a significant degree of control over its employees' words and actions, a government employer would have little chance to provide public services efficiently." *Connick*, 461 U.S. at 143.

students, not additional litigation, when ample school district employee protections already exist. For these reasons, amicus NSBA urges this Court to uphold the Ninth Circuit.

Respectfully submitted,

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